

1695. December 26.

BEATTIE against LAMBIE.

WILLIAM BEATTIE bailie of Bervie against Mr Sylvester Lambie, for reduction of a minute of agreement, whereby the Privy Council having given him the vacant stipend of the church of Meigle, for building a bridge over Bervie water, Mr Lambie made him believe it was only 1100 merks by year; so he set him a tack of it for 1000 merks; whereas, now he understands it is worth L. 1000 *communibus annis*, and this year, by reason of the dearth of victual, it will amount to no less than L. 100 Sterling; so being over-reached, he ought to be reponed, especially he being an administrator could not dilapidate; 2do, The minute never being extended, there was *locus pœnitentiæ* till extension; 3tio, There was only one subscribing witness, and so it was null by the act of Parliament 1681, and was not suppliable by condescending on others, or their designations. Answered to the first, It was a bargain of hazard, like *jactus retis*, and there was no *dolus dans causam contractui*, and though *læsio ultra dimidium justi pretii* is a ground of restitution by the Roman law, yet it had never been adopted as any part of ours; 2do, A minute subscribed could no more be resiled from than an extended contract; 3tio, The act 1681 did not hinder him to supply the defect, by referring the verity of the subscription to his oath.—THE LORDS repelled the reasons of reduction, and whoever else might quarrel this bargain on circumvention, this pursuer could not.

1695. December 27.—IN the cause Beattie against Lambie, mentioned 26th current, Beattie represented by a petition, That the minute bore a penalty of L. 200 Scots, in case of failzie, and wanted the adjection of that usual clause, "by and attour the performance of the premises;" and so craved to be free on paying the penalty, or so much as the Lords should modify *nomine damni*.—THE LORDS found the offering a penalty did not resolve, irritate, or annul the contract to which it was adjected; and the inventing that clause, that it should be *over and above*, was superfluous, and only *ad majorem cautelam*, and that it did not make the obligation alternative, either to perform or pay the penalty; in which case, the debtor would have his election; and which decision is consonant to former practiques in Durie, 19th March 1630, Crichton, No 5. p. 10035; and 4th March 1634, Murray, No 7. p. 10036.—THE LORDS thought Beattie over-reached in the bargain; but did not see it so competent to him as to the Moderator and Ministers of the Presbytery wherein this church lay, or to the Collector of the vacant stipends, to reduce a paction so prejudicial to a public, pious, and charitable work.—See WRIT.

Fol. Dic. v. 2. p. 50. Fountainball, v. 1. p. 692. & 693.

NO II.

The offering of a penalty does not resolve the contract. It does not make the obligation alternative, either to perform or pay the penalty.